

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:13-CR-00168-F-1

No. 5:15-CV-00207-F

TRAVIS JENKINS,)	
)	
Petitioner,)	
)	
v.)	<u>ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

This matter is before the court on the Government's Motion to Dismiss [DE-48] pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of its Motion to Dismiss, the Government has submitted the Declaration of Daniel Johnson. Mem. Supp. [DE-49-1] As a general rule, evidence should not be considered at the 12(b)(6) stage. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004). A court can convert a Rule 12(b)(6) motion into a motion for summary judgment so as to consider matters outside the pleadings. *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). However, if the court elects to make the conversion, it must assure that the parties are on notice of the changed status of the motion. *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979).

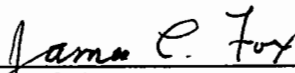
In this case, the Government's Motion to Dismiss references and relies upon Johnson's Declaration. Mem. Supp. [DE-49] at 5-6. The court concludes that conversion is warranted and Petitioner is entitled to notice.

In light of the foregoing, the court advises Petitioner that it intends to construe the Government's Motion to Dismiss as one seeking summary judgment and will consider Johnson's Declaration. *See Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). Petitioner is further

advised that he should respond to the Government's motion with affidavits, declarations, citations to particular parts of the record, or other material in such a manner so as to persuade this court that a genuine issue of material fact remains to be determined. Petitioner shall file his response to the Government's motion within twenty-one days.¹ The Government may file a reply, if any, within seven days thereafter.

SO ORDERED.

This the 22 day of December, 2015.



James C. Fox
Senior United States District Judge

¹ The court notes that Petitioner previously filed a Response in Opposition [DE-74] and a Supplemental Response [DE-75]. Petitioner's Response in Opposition includes the declaration of Tamy Jenkins.